

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Applications by BellSouth Corporation <i>et al.</i>)	CC Docket No. 01-277
for Authorization to Provide In-Region,)	
InterLATA Services in Georgia and Louisiana)	

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Introduction

The Commission is required, pursuant to section 271 of the Act, to afford the evaluation of the Department of Justice “substantial weight.” The Commission is required to afford the submissions of any other commenter in this proceeding – including those of state commissions – no particular weight. Although the opinion of the Department of Justice does not carry preclusive weight¹, the Commission is obligated to elevate the weight of the Department’s findings above those of all other parties to the proceeding, including the applicant, BellSouth. In particular, the Commission has long held that it must afford substantial weight to the Department’s “evaluation of whether the BOC satisfies each of the criteria for BOC entry under section 271.”² Thus, the substantial weight that the Commission must afford the Department’s evaluation applies not only to the Department’s overall conclusion, but more particularly to the Department’s determination as to the BOC’s compliance with each individual checklist item. This precedent is particularly important in the instant proceeding, where the Department has found that BellSouth satisfies some, but not all, of the checklist requirements.

The Commission has expressed its expectation that BOCs will file an “anchor state” application from which subsequent applications will flow. Under the Commission’s “anchor state” theory, the BOC files its strongest state application with the Commission and receives approval. Subsequent applications by the same BOC for

¹ 47 U.S.C. sec. 271(d)(2)(A).

² Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20563 (1997) (*Ameritech Michigan Order*), writ of mandamus issued sub nom. *Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998).

different states, to the extent those states utilize the same OSS as the approved anchor state, should expect approval if there are no material differences between the evidence on the record and evidence in the record of the approved application. The Georgia/Louisiana applications would become BellSouth's anchor states were the Commission to approve the applications. In other words, the Commission would be setting the bar for all future BellSouth applications at the status of BellSouth's checklist compliance in Georgia and Louisiana, which would become the benchmark for all future applications.

In its Evaluation, the Department of Justice recognized the critical importance of this application as the "anchor" filing for the BellSouth region. Specifically, the Department cautioned the Commission that "[r]equiring BellSouth to prove nondiscriminatory access to its OSS before this application is granted is important particularly because its first successful filing may well serve as the benchmark for evaluation of its OSS in states regionwide."³ The Commission should not ignore this wise counsel, particularly given the ongoing BellSouth OSS test in Florida. Should the Commission approve the Georgia/Louisiana applications and ignore the myriad problems unveiled in Florida, the Commission will be giving its stamp of approval to an OSS that is not yet compliant with the section 271 checklist. Of course, this is exactly why BellSouth filed these applications prematurely.

But the Department of Justice did more than just caution the Commission about the risk of lowering the bar and ignoring the findings of the Florida OSS test. The Department singled out the Florida test as more robust, more accurate, and a better gauge of BellSouth's OSS checklist compliance. Specifically, the Department concluded: "The

Florida test is broader in scope and promises to provide a more robust assessment of BellSouth's OSS than did the Georgia OSS test. Indeed, KPMG's Florida OSS test is identifying problems that were not detected during the Georgia OSS test -- problems that BellSouth is working to fix."⁴ And what happens to that process if the Commission approves the pending applications? BellSouth loses any incentive to fix problems found in Florida, because its OSS has been approved by the FCC "as-is." For this simple reason, the Department of Justice cautions the Commission that the implications of premature approval of these applications stretch far beyond Georgia and Louisiana to the rest of BellSouth's territory.

The Department of Justice refused to endorse BellSouth's applications, based principally on BellSouth's poor OSS and loop performance. The Department's negative evaluation will, no doubt, set off a mad scramble by BellSouth to submit late-filed evidence in an attempt to overcome the Department's conclusion. Indeed, the Commission has done a poor job of adhering to its own "complete when filed" rule by considering a plethora of late-filed evidence in recent long distance adjudications. Whatever the Commission decides to do with the evidence, it is clear that BellSouth had no choice but to come up with something. The Commission's precedent on negative Department evaluations is quite clear: "Because the Commission must accord substantial weight to the Department of Justice's evaluation of a section 271 application, if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, the BOC must submit more convincing evidence than that proffered [to] the

³ Department of Justice Evaluation at 3.

⁴ DOJ Evaluation at 6.

Department of Justice in order to satisfy its burden of proof.”⁵ It is time for the Commission to consider strongly whether accepting such evidence late in the process, long after the application has been filed, satisfies the statute and the Commission’s procedural rules.

The Commission has long considered its obligation to promote advanced services competition in section 271 proceedings.

The Commission recognized since its first approval of a BOC long distance application in 1999 that its statutory mandate to encourage deployment of advanced services is implicated by the competitive checklist of section 271. Specifically, the Commission concluded in the *Bell Atlantic New York 271 Order* that the “critical importance” of the competitive availability of broadband services required a particular focus on DSL wholesale activities of the BOC. Since requiring Bell Operating Companies to make a separate showing of checklist compliance with regard to DSL providers in 1999, the Commission has fulfilled its statutory mandate by requiring all subsequent BOC applicants to make separate and distinct showings of checklist compliance as to xDSL.⁶

BellSouth has chosen to ignore this longstanding requirement, under the theory that it is now BellSouth’s “turn” for a long distance application. Unlike Qwest, which wisely chose to wait until it has completed the task of opening its local markets to

⁵ BellSouth Louisiana II 271 Order at ¶ 52.

⁶ See *Bell Atlantic New York 271 Order* at ¶ 330 (“[W]e will find it most persuasive if future applicants under section 271, unlike this applicant, make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops, either through proof of a fully operational separate advanced services affiliate as described below, which may also include appropriate performance measures, or through a showing of nondiscrimination in accordance with the guidance provided herein. Given our statutory obligation to encourage deployment of advanced services and the critical importance of the provisioning of xDSL loops to the development of the advanced service marketplace, we emphasize our intention to examine this issue closely in the future.”).

competition before filing its long distance applications, BellSouth is trying to ram this one down the Commission's throat. Despite clear and explicit direction from the Commission over the course of three prior BellSouth premature filings, BellSouth still chooses, inexplicably, to file an application with a deficient OSS.⁷ BellSouth has a long history of testing the Commission, like a puppy chewing furniture repeatedly to see if its owner will tire of its persistence and simply acquiesce.⁸

The issues raised by Covad in this proceeding are not new to BellSouth. Indeed, the Commission's third rejection of a BellSouth long distance application reads like a preview of the instant proceeding:

In the *BellSouth South Carolina Order*, we identified a number of concerns relating to BellSouth's OSS functions for ordering and provisioning of unbundled network elements. In particular, we were concerned with BellSouth's reliance on manual processing of UNE orders and BellSouth's OSS for ordering and provisioning of UNE combinations. We made it clear that BellSouth should address these issues in any future application, even though such issues did not form the basis of our decision in the *BellSouth South Carolina Order*.⁹

BellSouth either didn't hear, or it didn't listen. Whatever the case, BellSouth is back at the Commission with its manual OSS, asking the Commission to conclude that requiring competitors to fax orders while giving its own retail arm full electronic OSS capabilities complies with the competitive checklist of section 271. It does not, and the Commission cannot so conclude.

The DOJ Evaluation.

⁷ See *BellSouth South Carolina Order*, 13 FCC Rcd. at 623-29 (concluding that failure to deploy an application-to-application interface denies competing carriers equivalent access to pre-ordering OSS functions).

⁸ See, e.g., *BellSouth Louisiana II 271 Order* at ¶ 68 ("The collocation offerings on which BellSouth bases its second section 271 application for Louisiana are virtually identical in all substantive respects to the collocation offerings that the Commission found defective in the *BellSouth South Carolina Order*, and they do not pass muster now.").

⁹ *BellSouth Louisiana II 271 Order* at ¶ 135.

Covad focuses these reply comments on the evaluation of the Department of Justice, which echoes the principal objections raised by Covad in this proceeding. In refusing to recommend that the Commission approve BellSouth's application, the Department concluded that competitive carrier complaints about BellSouth's OSS were "credible."¹⁰ More importantly, the Department concluded that "neither the reported performance data nor the results of the third-party OSS testing relied on in this application are sufficient to determine that these complaints are unfounded."¹¹ In addition, the Department concluded that BellSouth's reported performance measures "appear to be unreliable in several significant respects."¹² In sum, the Department concluded that BellSouth has not satisfied its burden of proof in this proceeding – as the Commission has long held, the BOC applicant at all times holds the burden of proving checklist compliance, even if no party opposes its application. BellSouth simply has not, in the Department's view, satisfied that burden.

Shortcomings in OSS testing.

The Department found that BellSouth's Georgia OSS test, which BellSouth relies on in this proceeding for proof of OSS checklist compliance, was seriously deficient. The Department concluded that the Georgia test was limited in scope in that "number of key areas remained outside the parameters of the test."¹³ The Department also concluded that, unlike in New York, KPMG did not draft the Master Test Plan – BellSouth did.¹⁴ In addition, the Department concluded that a number of Georgia test exceptions "appear to

¹⁰ DOJ Evaluation at 2.

¹¹ DOJ Evaluation at 2.

¹² Department Evaluation at 2.

¹³ DOJ Evaluation at 5.

¹⁴ DOJ Evaluation at 5.

have been closed without adequate verification that the problems had been resolved.”¹⁵

Finally, the Department concluded that KMPG has not completed the metrics testing ordered by the Georgia PSC.”¹⁶

The areas of testing that the Department found were omitted include the areas raised by Covad in its initial comments as evidence of BellSouth’s failure to prove checklist compliance. For example, the Department concluded that key areas omitted included “testing of the systems for electronic ordering of xDSL-related loops and line sharing; the LENS interface, which is used to place the majority of CLEC orders; the most recent ordering system, OSS99 (an older version was used instead); documentation and support related to the design and development of CLEC interfaces; maintenance and repair and billing work centers; and general support processes, such as for establishing accounts, collocation processes, or training account team personnel.”¹⁷

These findings echo Covad’s comments in this proceeding. BellSouth has submitted no evidence whatsoever to support its claim that its OSS for xDSL providers is compliant with the Commission’s OSS rules. Indeed, as noted by Covad in its initial comments (and by the Department in its Evaluation), the Florida OSS test has turned up numerous exceptions related to xDSL OSS. Because BellSouth has represented to the Commission that its OSS is the same in each state, there can be only one reason why an OSS problem turned up by KPMG in Florida was not noted by KPMG in Georgia – the Georgia test was woefully incomplete.¹⁸ Indeed, in ordering a separate OSS test in

¹⁵ DOJ Evaluation at 5.

¹⁶ DOJ Evaluation at 5.

¹⁷ DOJ Evaluation at 5 n.12.

¹⁸ Indeed, throughout its Evaluation, the Department highlights OSS flaws found in Florida but not in Georgia. DOJ also notes that FLA test (not GA) found accuracy problems: *See, e.g.*, DOJ Evaluation at 17-18, n.51 (“Furthermore, in its Florida test, KPMG issued an exception in which it concluded that “BellSouth’s systems or representatives have not consistently provisioned service and features as specified

Florida, the Florida Commission itself expressed doubts about the validity of the Georgia test.¹⁹

Of course, the failure of KPMG to test the OSS processes and systems related to xDSL is one of two issues Covad raised regarding BellSouth OSS. The second issue is that BellSouth doesn't *have* any electronic OSS for the vast majority of loops that Covad orders from BellSouth. The Department of Justice concluded that Covad and its fellow competitive LECs suffer serious harm as a result of the lack of mechanized OSS capabilities. Of particular importance for the Commission, the Department concluded that "[t]he ability of CLECs to compete with BellSouth -- particularly in the residential market, where volumes are high and margins are thin -- will depend largely on efficient electronic processing of orders and provisioning notices."²⁰ Where there is no such electronic OSS capability -- as in the BellSouth region -- the hope for residential competition is slight.²¹

For Covad, lack of mechanized OSS is a non-trivial matter. In September 2001, 73% of Covad's loop volume in Georgia had to be ordered manually, because BellSouth has no electronic loop ordering capability for any of those loop products ordered by Covad. Seventy-three percent of Covad's customers had to suffer through a manual loop process, as well as all of the added expense, time, and poor quality service that Covad highlighted in its initial comments, and the Department of Justice echoed in its

in orders submitted by KPMG Consulting." KPMG FL OSS Test, Exception 112 at 1 (of the 190 CSRs that KPMG analyzed in Florida, BellSouth updated only 54 percent accurately).").

¹⁹ See Florida PSC OSS Testing Order at 6-7 (raising concerns about the independence of the Georgia OSS test), *cited by* DOJ Evaluation at 5, n.13.

²⁰ DOJ Evaluation at 14.

²¹ As the Commission well knows, Covad is dedicated to the residential market -- indeed, approximately 50% of Covad's over 350,000 customers are residential customers.

evaluation.²² Specifically, the Department concluded that “[o]rders that are manually processed are more likely to be provisioned incorrectly, and manual processing prevents CLECs from relying on their own automated systems and slows CLECs’ response to customer inquiries.”²³ All of those issues, as detailed by Covad in its comments, are a result of BellSouth’s refusal to provide electronic OSS for the vast majority of Covad’s loop volume. BellSouth has effectively denied Covad a meaningful opportunity to compete.

This lack of electronic OSS is particularly egregious where, as here, BellSouth has a clear retail analogue with electronic ordering capability.²⁴ Thus, the IDSL loop, which makes up two-thirds of Covad’s order volume for September 2001, is simply an ISDN loop provisioned through slots other than the first four in the Marconi DLC. It is, for all intents and purposes, an ISDN loop. BellSouth sells ISDN retail services, and makes electronic ordering for ISDN available to its retail arm. Covad has no electronic ordering available for IDSL loops. BellSouth could not claim to be surprised that it should have made such capability available: the Commission has addressed this lack of parity since its early section 271 jurisprudence. Specifically, the *Ameritech Michigan Order* specifies that a BOC must offer OSS access to competing carriers that is equivalent to the access the BOC provides itself in the case of OSS functions that are

²² See DOJ Evaluation at 14 (“To manually process an order, BellSouth’s service representatives re-type some or all of the information on the CLEC order form into an internal electronic service order. This manual processing increases the expense of CLEC ordering, lengthens the time required to place customers in service, and creates errors that cause service requests to be improperly rejected or to be provisioned incorrectly.”).

²³ DOJ Evaluation at 13.

²⁴ As the Commission has concluded, where a retail analogue exists, a BOC must provide access to competing carriers in “substantially the same time and manner” as it provides access to itself. *Ameritech Michigan Order*, 12 FCC Rcd at 20118-19

analogous to OSS functions that a BOC provides to itself.²⁵ In prior BellSouth 271 orders, the Commission found that the additional costs, delays, and human errors likely to result from this lack of parity "ha[ve] a significant impact on a new entrant's ability to compete effectively in the local exchange market and to serve its customers in a timely and efficient manner."²⁶ Given these repeated findings in prior section 271 orders, it is particularly disturbing that BellSouth filed anew and yet again flouted the Commission's clear rules.

Even where BellSouth does provide electronic OSS capability (in Covad's case, for a paltry 27% of its loop volume in September 2001), the OSS does not work properly. The Department of Justice echoed Covad's concerns about a lack of any test environment within which Covad could have adequately tested with BellSouth before launching OSS capabilities. Specifically, the Department concluded that "CLEC efforts to create robust electronic connections to BellSouth are hindered by an inadequate test environment and a process for implementing changes to BellSouth's OSS that appears overwhelmed by the demands placed on it."²⁷ Covad has been delayed in implementing EDI because of the lack of an adequate test environment. As the Department concluded, BellSouth's current testing environment "is not currently equipped to permit testing of DSL orders, which

²⁵ *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

²⁶ *BellSouth South Carolina Order*, 13 FCC Rcd at 623; see *First BellSouth Louisiana Order*, 13 FCC Rcd at 6277-78. The Commission also found that the lack of a machine-to-machine interface prevents a competing carrier from developing its own customized interface that its staff could use nationwide, and requires such a carrier to train its staff on BellSouth's proprietary system as well as systems used in other regions of the country. *BellSouth South Carolina Order*, 13 FCC Rcd at 624-25; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6277.

²⁷ DOJ Evaluation at 13.

means that DSL providers cannot test upgrades to their systems.”²⁸ Covad risks losing customers while turning up OSS capabilities with BellSouth, because Covad is never given the opportunity to test OSS capabilities in other than a production environment. The Department’s findings echo Covad’s concerns.

BellSouth in its comments blames any CLEC concerns with BellSouth’s nonfunctional OSS on the CLECs themselves. Specifically, BellSouth claims either that CLECs failed to test the OSS capabilities adequately in BellSouth’s testing environment, or that CLECs failed to bring their issues to Change Management for resolution. The Department’s Evaluation addressed both of those excuses and rejects them. First, as to the testing environment, as noted above, the Department concluded that “BellSouth also has not demonstrated that it supports CLECs’ need to build and maintain the interfaces they use to submit orders to BellSouth. In particular, BellSouth’s quality assurance testing environment for its interfaces appears inadequate, and its “change management” process for resolving problems affecting BellSouth’s interfaces and updates to its systems appears unresponsive to CLEC concerns.”²⁹ Second, as to change management, the Department concluded that BellSouth’s change management process does not permit CLECs any means of ensuring their problems will actually be addressed. Specifically, the Department concluded that BellSouth’s change management process “does not appear to prompt efficient implementation of system fixes for known defects in BellSouth’s OSS 97 as well as system enhancements desired by CLECs.”³⁰ In short, CLECs have no

²⁸ DOJ Evaluation at 27. KPMG opened an exception in the Florida test stating that “BellSouth lacks an appropriate process, methodology, and robust test environment for the testing of the electronic data (EDI) interface.” KPMG FL OSS Test, Amended Exception 6 at 1. In describing the impact of this deficiency, KPMG explains that deficiencies in environment make it difficult for CLECs to develop defect-free interfaces, and therefore affect their ability to deliver uninterrupted service to customers. *Id.* at 3.

²⁹ DOJ Evaluation at 26.

³⁰ DOJ Evaluation at 29.

recourse – either in testing environments or in change management – to ensure that OSS is functional before launching it in a production environment, to the detriment of the CLEC’s customers.

The Department succinctly summarized the basic competitive concerns that underlie its finding that BellSouth does not comply with its OSS checklist obligations:

The Department is concerned, however, that the combined effects of contending with these problems -- many of which most affect CLECs relying on the UNE-platform and DSL-capable loops -- may raise costs for CLECs operating in Georgia and Louisiana, degrade the quality of service CLECs offer to their customers, erode CLEC reputations and customer relationships, and constrain CLECs from aggressively marketing their services.”³¹

The Department conclusions related to the competitive harm of manual OSS apply not only to the loop products for which BellSouth has no electronic OSS whatsoever (73% of Covad’s order volume), but also to OSS that are purportedly electronic but do not result in flow through of orders. As the Department found, a substantial portion of loop orders that are supposed to be handled electronically are in reality handled manually.

Specifically, the Department concluded, “BellSouth’s most recent iteration of its achieved flow-through rates indicates that its service representatives process about a third of electronically submitted UNE orders manually.”³² In sum, then, even those orders that BellSouth purports to process electronically are, at least one-third of the time, processed manually. These gives rise to competitive concerns for an even greater percentage of loop orders than simply those that have no electronic OSS at all. For example, if one-third of the Covad orders that could flow through BellSouth’s systems did not do so, that

³¹ DOJ Evaluation at 14.

³² DOJ Evaluation at 14, *citing* PM O-3: Percent Flow-Through Service Requests--Achieved (UNE flow through of 68.8 percent).

would mean that 82%, not 73% of Covad's orders do not flow through BellSouth's OSS.³³

Of course, the true competitive concerns of lack of functional electronic OSS are only realized when competitive carriers are processing significant volumes of orders. For this reason, the Commission has traditionally looked to so-called "stress-testing" of the BOC's ability to process commercially significant volumes of orders through its OSS. The Department of Justice, in its evaluation of the instant applications, concluded that no such capabilities had been proven. Specifically, the Department concluded that:

KPMG Georgia's capacity test provides little evidence about BellSouth's ability to process high volumes of orders electronically. In Georgia, KPMG conducted the majority of volume testing in a separate test environment. BellSouth Stacy Aff. ¶ 584. At the Georgia hearing on the test, KPMG admitted that results obtained in the test environment do not assure that the production systems will perform to Georgia PSC standards. GA PSC OSS Hr'g Tr. at 226-27. BellSouth has since augmented the capacity of its production systems because the Florida test requires that capacity testing be done in production systems. *See* BellSouth Stacy Aff. ¶ 594; BellSouth Volume Test *Ex Parte* at 4. However, KPMG has suspended Florida capacity testing because issues it has identified apparently prevent the test from proceeding at this time. BellSouth Volume Test *Ex Parte* at 2-3.³⁴

Given the Commission's interest in ensuring that competition in the BellSouth region expands, rather than contracts, in the post-271 entry environment, these Department of Justice findings should be of particular concern. The failure of BellSouth to submit valid evidence of its ability to handle large capacity of CLEC orders – and the discovery in Florida of serious issues with capacity testing – should be sufficient evidence that BellSouth has not satisfied its burden of proving that it can handle commercial volumes of CLEC orders through its OSS.

³³ $73\% + 1/3(27\%) = 82\%$

³⁴ DOJ Evaluation at 20, n.60.

Finally, it is important for the Commission to note that Covad constitutes a nontrivial amount of the local competition that exists, such as it is, in Georgia and Louisiana. For example, the performance metric information submitted by BellSouth for Georgia reveals that Covad alone makes up approximately 17% of the standalone unbundled loop volume in Georgia. That is a very significant percentage for just one competitor.³⁵ It suggests that the Commission should pay close attention to the competitive concerns Covad raises.

Shortcomings of BellSouth-reported performance metrics

The Department also took issue with KPMG's review of BellSouth's performance in Georgia. Specifically, the Department noted that "a number of performance-related criteria were deemed satisfied even where performance did not meet established Georgia PSC standards."³⁶ Specifically, the Department cited several instances in KPMG's final report where BellSouth failed the specific state-established performance benchmark, but was nonetheless given a passing grade.³⁷ Most importantly, the Department noted that it was "gravely concerned" by BellSouth's admission that it did not process test orders as it would have during the normal course of business.³⁸ The Department noted BellSouth's

³⁵ The Commission also must not ignore BellSouth's very public focus on the expansion and success of its own retail DSL services. *See, e.g.*, "Bellsouth Details 2002 Growth Strategies At New York Analyst Briefing." ("Bellsouth Surpasses Peers And Cable Providers In Dsl Growth And Customer Satisfaction. In two years, BellSouth has amassed more than 463,000 DSL subscribers and expects to reach its goal of 600,000 subscribers by year-end. With its rapid acceleration and highly-targeted expansion plans, BellSouth leads other DSL-providers in subscriber growth with 617% in 2000 and 179% growth in 2001."), available at

http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=38144&PROACTIVE_ID=cecfcecdc6cfcfcfc5cecfcf9c7c8c6cacbc5cf. Given the incredible level of discrimination against competitors, it is no wonder that BellSouth can claim to provide superior service than its DSL peers. The Commission should take note of this an similar claims by BellSouth, as they help explain BellSouth's eagerness to maintain a competitive advantage over Covad, regardless of the requirements of the law.

³⁶ DOJ Evaluation at 5, n.14.

³⁷ *See, e.g.*, KPMG GA MTP Final Report at IV-A-18 - 19 & n. 25 (PRE-1-3-8), IV-D-10 (PRE-4-3-1), IV-E-10 (PRE-5-3-2), and V-J-17 (O&P-10-3-8).

³⁸ DOJ Evaluation at 5, n.14.

admission³⁹ that KPMG orders were specifically identified as test orders and processed with special management supervision. The Department concluded that “[s]uch actions should not be condoned as they undermine the integrity of the Georgia test results as a whole.”⁴⁰ In addition, the Department noted that “BellSouth acknowledges, for instance, that coding errors for BellSouth’s FOC and Reject Response Completeness measures make them unreliable: “For mechanized LSRs, this measure understates BellSouth’s performance and cannot be relied upon to assess BellSouth’s performance. For partially mechanized LSRs, the coding is incorrect and produces inaccurate results.”⁴¹ This panoply of erroneous metric reporting highlights the unreliable state of the factual record in this proceeding.

Specifically as to xDSL orders, the Department concluded that BellSouth has not underreported its flow through performance – it has completely failed to report it at all. “BellSouth has repeatedly revised its reported flow-through performance measures for electronically submitted orders and recently informed the Department that a whole category of orders, DSL orders, have not been included in these calculations.”⁴² Although BellSouth promises to perform a manual analysis and submit the results of its findings, the Commission cannot have any confidence in such unverified, late-filed evidence. As the Commission has repeatedly concluded, order flow-through rates are of particular competitive significance because “they demonstrate whether a BOC is able to process competing carriers’ orders, at reasonably foreseeable commercial volumes, in a

³⁹ BellSouth Stacy Aff. at ¶¶ 452-54.

⁴⁰ DOJ Evaluation at 5, n.14.

⁴¹ DOJ Evaluation at 32, n.11, *quoting* BellSouth Georgia Varner Aff. at ¶ 42.

⁴² DOJ Evaluation at 15. *See also* DOJ Evaluation at 35 (“BellSouth realized that it had failed to build the necessary links from its OSS platform that processes xDSL orders to its system that processes metrics data, and thus erroneously excludes xDSL orders from its flow-through measures.”).

nondiscriminatory manner. Evidence of flow-through also serves as a clear and effective indicator of other significant problems that underlie a determination of whether a BOC is providing nondiscriminatory access to its operations support systems.”⁴³ Even more important, the Commission has addressed this exact issue with BellSouth before:

In particular, BellSouth does not disaggregate competing LECs' flow-through orders for UNEs placed over the EDI interface. This level of disaggregation is necessary to evaluate whether BellSouth can process UNE orders placed over the EDI interface. In future applications, we expect BellSouth to address the degree of manual intervention for UNE orders and whether BellSouth's ordering interface for UNEs meets the nondiscriminatory requirement.⁴⁴

BellSouth has by its own admission submitted no evidence whatsoever as to xDSL, and thus has completely failed to satisfy its burden of proof as to flow-through.

In addition, the Department found that BellSouth underreported its repair and maintenance metrics. Specifically, the Department concluded that “BellSouth’s calculation for customer trouble report rates for xDSL and line-sharing, which measure network quality in terms of the frequency with which troubles are reported, understated the retail analog by not including all comparable retail data, suggesting that metrics did not provide accurate comparisons of wholesale and retail performance.”⁴⁵ In sum, the Commission can have no confidence as to the validity of BellSouth’s performance metrics, which are incorrect by BellSouth’s own admission as to a wide variety of xDSL metrics, and have not been and will not be subject to any independent evaluation while these two applications are pending. (The invalid Georgia test is equally applicable to

⁴³ BellSouth Louisiana II 271 Order at ¶ 108.

⁴⁴ BellSouth Louisiana II 271 Order at ¶ 138. *See also BellSouth South Carolina Order*, 13 FCC Rcd at 616-17 (concluding “[w]e are also concerned about the level of manual processing involved in the ordering and provisioning of unbundled network elements”).

⁴⁵ DOJ Evaluation at 32, n.10, *citing* . BellSouth GA Varner Aff. 203-04.

Louisiana, because as the Louisiana Commission notes in its comments to this Commission, it relied on the Georgia OSS test in reaching its own conclusions.⁴⁶⁾

State Commission findings on OSS are not owed deference in this proceeding.

The Commission has often, in evaluating BOC long distance applications, looked to the state commissions to resolve factual disputes. Indeed, the Commission has in certain cases deferred to the factual findings of the state commissions rather than make its own independent evaluation. As to the xDSL issues in this proceeding, the Commission simply cannot defer to the states. For example, the Louisiana Commission approved BellSouth's application despite a clear record (cited to by that very Commission) of declining performance by BellSouth. For example, the Louisiana Commission noted that BellSouth met 81.5% of ordering, provisioning, and maintenance and repair benchmarks in June, 74.2% in July, and 72.4% in August. Specifically within the ordering metrics, BellSouth plunged from meeting 80% of the benchmarks in April down to only 66.7% in June. Within repair and maintenance, BellSouth dropped from 89% compliance to 55.6%.⁴⁷ Covad presented detailed arguments to the Louisiana Commission regarding the discriminatory nature of BellSouth's performance, and the Louisiana Commission made no finding whatsoever regarding Covad's comments. Rather, the Commission made the following conclusory statement in a footnote: "Mr. Varner adequately addressed Covad's performance criticisms in his reply affidavit at ¶¶ 135-155."⁴⁸ This is hardly the reasoned and thorough factfinding to which the Commission should grant deference.

⁴⁶ LA Commission Comments at 25-30.

⁴⁷ LA Commission Comments at 62.

⁴⁸ LA Commission Comments at 63, n. 24.

The Department of Justice too took note of the Louisiana Commission's conclusion that BellSouth's performance needed improvement in numerous areas. For example, the Department noted that the Louisiana Commission "stated that BellSouth's performance needed improvement on several measures, including Order Completion Interval (resale and UNE), Reject Interval (mechanized resale and UNE), FOC & Reject Response Completeness (mechanized and partially mechanized resale and UNE), Percent Flow-Through Service Requests, Percent Provisioning Troubles within 30 Days (UNE loop/port combination), Average Completion Notice Interval (UNE loop/port combination), and Percent Repeat Troubles within 30 Days (xDSL)."⁴⁹ The Department also noted that the Georgia Commission highlighted numerous problems as well: "Likewise, the Georgia PSC indicated that several issues would continue to be addressed through six-month reviews, third-party audits, and monthly performance reports (addressing service order accuracy, change control, and the provisioning troubles within 30 days)."⁵⁰ In sum, the Department concluded "BellSouth missed by a wide margin almost all of the order accuracy performance standards for UNEs in June and July in both Georgia and Louisiana."⁵¹ Based on this factual record, this Commission simply cannot approve the pending applications.

Conclusion

Section 271(d)(2)(A) of the Act requires the Commission to "consult with the Attorney General" before making any determination approving or denying a section 271 application. Traditionally, the Commission consults with the Department by receiving and incorporating into its eventual adjudication the Department's evaluation, which in the

⁴⁹ LA Commission evaluation at 40.

⁵⁰ GA PSC Comments at 126, 129, 131.

instant proceeding was released on November 6. In this case, however, the Commission should not permit the resources of the Department to remain unused for the remainder of this proceeding, the statutory period for which is only half over. Because the Department has suggested in its comments that BellSouth may offer new evidence to the Commission over the course of this proceeding, the Commission should consult the Department if such new evidence is received. If it does not do so, and decides to evaluate the new evidence unilaterally, and to base its decision on that new evidence without the Department's evaluation of that evidence, the Commission will have abrogated its statutory duty. Section 271(d)(2)(A) requires the Commission to consult with the Attorney General before making its determination. If the Commission bases its determination in this proceeding on evidence submitted by BellSouth that the Department has not been able to evaluate, it will be as if the Department never participated in this proceeding at all.

For the reasons set out above and in Covad's initial comments and subsequent submissions in this proceeding, the Commission should deny BellSouth's Georgia and Louisiana long distance applications.

⁵¹ DOJ Evaluation at 17, n.51.

Respectfully submitted,

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